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No. 633

Supreme Court of the United States

October Term, 1959

ALBERT SAMUEL WRIGHT,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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I. Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled cause on the 21st day of October, 1959.

II. CITATIONS TO OPINIONS BELOW.

Neither the Supreme Court of Ohio nor the Court of Appeals of the First Appellate District of Ohio, nor the Court of Common Pleas of Hamilton County, Ohio, wrote any opinion in this cause.

III. JURISDICTION OF THIS HONORABLE COURT TO GRANT THIS PETITION.

The judgment of the Supreme Court of Ohio was entered on October 7, 1959; re-hearing was denied on October

21, 1959. The jurisdiction of this Honorable Court is invoked under 28 U. S. C. Section 1257 (3), Rule 23 (1) (F) of the Rules of this Honorable Court.

IV. HOW FEDERAL QUESTION IS PRESENTED.

The Federal question was raised by the refusal of the trial court (see appendix page 5) to allow counsel for the petitioner to cross-examine one of respondent's witnesses during the presentation of respondent's case in chief, as to a material element of the offense for which petitioner was tried and convicted. By state law, petitioner could not have been convicted of the offense for which he was tried unless this element of the offense was proven by respondent beyond a reasonable doubt.

V. STATUTE INVOLVED

Section 2907.11, Revised Code of Ohio.

> "No person shall have or keep in his possession, tools, implements, or other things used by burglars for housebreaking, forcing doors, windows, locks, or buildings, or other places where goods, wares, merchandise, or money are kept with the intention of using such implements or tools burglariously.
> Whoever violates this section shall be imprisoned not less than one nor more than five years."

VI. QUESTION PRESENTED.

Can a state, consistent with *Salsburg* v. *Maryland*, 346 U. S. 545, and *Smith* v. *California*, 28 L. W. 4033, Dec. 14, 1959, in the trial of a criminal case in a state court in which intent, by the law of that state, is an essential element of the offense, establish rules of evidence, that suppress competent evidence on the question of that intent, regardless of how said evidence is obtained?

VII. STATEMENT OF THE CASE.

Petitioner was convicted in the Court of Common Pleas of Hamilton County (after a trial by jury had been waived) of possession of burglary tools with the intention of using them burglariously. From his sentence of imprisonment of from one to five years in the Ohio Penitentiary, petitioner appealed to the Court of Appeals for Hamilton County, Ohio, and to the Supreme Court of Ohio, alleging and contending in all of said appeals that his federal constitutional rights had been violated.

From the affirmance of his conviction, petitioner is now asking this Honorable Court to grant a petition for a Writ of Certiorari to the Supreme Court of Ohio.

Here is how the federal question was raised in the trial court (Under Section 2907.11 of the Revised Code of Ohio; intent is an essential element of the offense, *Baldwin* v. *The State*, 132 O.S., 302, *State* v. *Cimpritz*, 93 O.A., 407, 51 O.O., 173): on Page 95 of the Bill of Exceptions the following occurred at the trial on cross-examination by appellant's counsel of a witness called by the respondent while respondent was presenting its case in chief.

> "Q. You will pardon me just a moment? Have you, Lieutenant, any evidence to offer this Court that following, as of September 5, 1955, that Samuel Wright intended to use these tools in a burglary?
>
> Mr. Schoettmer: Objection.
>
> The Court: I will sustain the objection.
>
> Mr. Hopkins: (Attorney for petitioner in the trial). Exception. I have no further questions of this witness at this trial."

Petitioner urges that the refusal of the trial court to permit him to offer this evidence, or at the very least, to find out if there was any such evidence, prevented him from having a fair trial and denied to him procedural due process of law.

VIII. REASONS FOR GRANTING THE WRIT.

1. Rules of Evidence are procedural. *Salsburg* v. *Maryland*, 346 U.S., 545, *Smith* v. *California*, 28 L.W., 4033.

2. The due process of the Fourteenth Amendment does not prevent the introduction of evidence in a criminal case in a state court of evidence illegally obtained. *Wolfe* v. *Colorado*, 338 U.S., 25.

3. Any evidence bearing upon an essential element of an offense in a state criminal case — evidence that is not improper per se, such as hearsay, must be admitted. Otherwise the principle of fundamental fairness of a trial is flagrantly disregarded. *Salsburg* v. *Maryland*, 346 U.S., 545, *Wolfe* v. *Colorado*, 338 U.S., 25, *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S., 285 at 295, *U. S.* v. *Matol*, 146 Fed. (2nd) 197. See also concurring opinion of Mr. Justice Frankfurter in *Smith* v. *California*, 28 L.W., 4033, 4037, and concurring in part and dissenting in part opinion of Mr. Justice Harlan, *Smith* v. *California*, 28 L.W. 4033, 4040 for the need of fluidity and liberality in the allowance of evidence bearing on the question of scienter in criminal cases, scienter and intent being virtually synonymous.

IX. CONCLUSION.

For the foregoing reasons, this Petition For A Writ of Certiorari to the Supreme Court of Ohio should be granted.

All of which is respectfully submitted by

MELVIN EDWARD SCHAENGOLD
Attorney for Petitioner

WILLIAM F. HOPKINS, Esq.,
HARVEY B. WOODS, Esq.,
of Counsel.

APPENDIX

HOW FEDERAL QUESTION WAS RAISED AT THE TRIAL COURT.

Bill of Exceptions, Court of Common Pleas, Hamilton County, Ohio, State of Ohio v. Albert S. Wright, Criminal Number 70040.

Page 95:

On cross-examination by William F. Hopkins, Esq., Attorney for Petitioner, of a witness for respondent during the presentation, in chief, of the respondent's case.

"Q. You will pardon me just a moment? Have you, Lieutenant, any evidence to offer this Court that following, as of September 9, 1955, that Samuel Wright intended to use these tools in a burglary?

Mr. Schoettmer: Objection.

The Court: I will sustain the objection.

Mr. Hopkins: Exception. I have no further questions of this witness at this time.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of February 23, 1960, denying the Petition for a Writ of Certiorari to The Supreme Court of Ohio, and that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio in the above entitled cause as prayed for in the petition for certiorari filed on January 7, 1960.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

This Petition for Rehearing is filed under Rule 58 (2) of the Rules of this Court and in accordance with the opinions of this Court in *Schreiber-Schroth Co.* v. *Cleveland Trust Co.*, 305 US 47, 50; *Hickman* v. *Taylor*, 327 US 808, 328 US 876, 329 US 459, and *Brinkhoff-Faris Co.* v. *Hill*, 280 US 604, 550, 281 US 673.

And, in connection with those authorities, gentlemen, consider if you will the remarks of Mr. Chief Justice Vinson before the American Bar Association on September 7, 1949 (St. Louis Daily Record, September 8, 1949, Page 1, quoted in Stern and Gressman, Supreme Court Practice, Second Edition, BNA, Washington, D. C., 1954, at pp: 107-108). So important does petitioner deem the remarks of Mr Chief Justice Vinson that he is setting them forth haec verba:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina 'to secure the national rights and uniformity of judgments'. The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the court. *To remain effective, the Supreme Court must continue to decide only those cases whose resolution will have immediate importance far beyond the particular facts and parties involved. Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country.*"

Now, gentlemen, by way of background, and this problem requires background as background is the heart of it as will be very shortly developed, consider this: United States Code Annotated contains over 50 volumes; the codes of each of the 50 states contain over 5 volumes each. Add to them the number of pages in each code of ordinances of every city, town, village, hamlet, and metropolitan form of government in this country. To that total add the total of pages that contain all of the various administrative rules, rulings, and regulations. *Now, add them all up and you will find that there are over one million pages of law, ordinances, regulations and rulings in this country, the violation of any which is a crime.* And keeping in mind that the common law with its maxim, "*Actus non facit reum, nisi sit mens rea*" (An act does not make the doer of it guilty, unless the mind be guilty; that is unless the intention be criminal. The intent and the act must both concur to constitute the crime. *Lord Kenyon, C.J., 7 Term 514; Broom Max 306, Black's Law Dictionary, 4th edition, West Publishing Co.,* St. Paul, Minnesota, 1951) is not only our heritage but also the basis of our jurisprudence, and also keeping the total that you have just added in mind, gentlemen, please ask yourselves this question:

When Chief Justice Vinson was making the remarks about the nature of the certiorari jurisdiction that he was making to the American Bar Association and that are quoted here, wasn't he talking as a lawyer to lawyers with something to say?

Now, gentlemen, on the theory that Chief Justice Vinson was speaking as a lawyer to lawyers and had something of practical value to say, and bearing in mind the statistics that you have before you, this is the type of case that he had in mind when he referred to: "class actions" and to

"tremendously important legal principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country." A person in this country, any person, in a situation in which the intention with which he did an act is at issue and his life, liberty, and/or property depends on the manner in which he shows his intention should be allowed to hunt for evidence that has bearing on the question of his intention.

(Kindly refer back to Page 3 of the Petition for a Writ of Certiorari where the right of the petitioner herein to hunt for such evidence was denied by the trial court.)

If it is the law that a defendant cannot hunt for evidence – and if that is the law it is new law and could stand iteration and re-iteration until it becomes accepted as such – then this Court, following the remarks of Mr. Chief Justice Vinson and considering that denial of certiorari does not always dispose of the particular case before the Court but can cause the same case to come back again (habeas corpus after denial of certiorari being permitted – thus in effect forcing this Court to decide the same case twice, *Brown v. Allen*, 344 US 443), should grant certiorari to settle the issue raised in this case – the right of a defendant to hunt for evidence – that is of the utmost importance to any defendant in any criminal case in any court – state, federal, local, where intent is an essential element of the offense. And certainly this Court can take judicial notice of the fact that the element of intent is an essential element of the great and overwhelming majority of all criminal offenses in this country regardless of the sovereignty that enacts the particular offense in question.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari to the Supreme Court of Ohio, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Supreme Court of Ohio.

All of which is respectfully submitted by,

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Of Counsel.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay; and is restricted to grounds specified in Rule 58 (2) of the Rules of this Court.

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